

UNITED STATES DISTRICT COURT Apr 03, 2019
EASTERN DISTRICT OF WASHINGTON

SEAN F. McAVOY, CLERK

ALETA BUSSELMAN,

Plaintiff,

v.

BATTELLE MEMORIAL
INSTITUTE, an Ohio nonprofit
corporation,

Defendant.

No. 4:18-cv-05109-SMJ

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S MOTION FOR
PROTECTIVE ORDER AND TO
MODIFY SCHEDULING ORDER**

Before the Court is Defendant Battelle Memorial Institute's Motion for a Protective Order and to Modify the Scheduling Order, ECF No. 32, as corrected by ECF Nos. 35, 35-1. Plaintiff Aleta Busselman opposes three aspects of Defendant's motion. *See* ECF No. 41, as corrected by ECF Nos. 43, 43-1. Because oral argument is unnecessary, the Court decides Defendant's motion without it. *See* LCivR 7(i)(3)(B)(iii). Having reviewed the file in this matter, the Court finds good cause to grant Defendant partial relief.

The scope of discovery generally encompasses

any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties'

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1 relative access to relevant information, the parties' resources, the
2 importance of the discovery in resolving the issues, and whether the
3 burden or expense of the proposed discovery outweighs its likely
4 benefit.

5 Fed. R. Civ. P. 26(b)(1). But for good cause, the Court may issue a protective order
6 "to protect a party or person from annoyance, embarrassment, oppression, or undue
7 burden or expense." Fed. R. Civ. P. 26(c)(1). "A party asserting good cause bears
8 the burden . . . of showing that specific prejudice or harm will result if no protective
9 order is granted." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th
10 Cir. 2003). "[B]road allegations of harm, unsubstantiated by specific examples or
11 articulated reasoning, do not satisfy th[is] test." *Id.* (quoting *Beckman Indus., Inc.*
12 *v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992)).

13 If a protective order is warranted, the Court may forbid the discovery sought,
14 limit its scope, or specify certain terms or methods governing it. Fed. R. Civ. P.
15 26(c)(1)(A)–(D). If a protective order is unwarranted, either in whole or in part, the
16 Court may order, on just terms, that a party or person provide or permit the
17 discovery sought. Fed. R. Civ. P. 26(c)(2).

18 **A. Defendant's motion is moot as to Plaintiff's withdrawn discovery
19 requests.**

20 Plaintiff has withdrawn interrogatories 3, 5, and 11, and requests for
21 production 17, 19, and 25. ECF No. 43-1 at 12–13. Therefore, the Court denies as
22 moot Defendant's motion concerning Plaintiff's withdrawn discovery requests.

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1 **B. Defendant's motion is moot as to Plaintiff's request for production 2.**

2 Plaintiff has narrowed request for production 2 and Defendant has agreed to
3 produce the designated personnel files. ECF No. 43-1 at 10; ECF No. 44 at 7.
4 Therefore, the Court denies as moot Defendant's motion concerning Plaintiff's
5 request for production 2.

6 **C. Defendant's motion is moot as to Plaintiff's requests for production 5
7 and 30.**

8 The parties no longer dispute Plaintiff's requests for production 5 and 30
9 because Defendant has produced the requested emails. ECF No. 43-1 at 8; ECF No.
10 44 at 9. Therefore, the Court denies as moot Defendant's motion concerning
11 Plaintiff's requests for production 5 and 30.

12 **D. Defendant demonstrates good cause to limit Plaintiff's interrogatories 7,
13 8, and 9, and requests for production 22 and 23.**

14 Plaintiff asks Defendant to identify every employee who, in the past ten
15 years, has "complained" about John LaFemina, Cindy Doyle, or Marty Conger. ECF
16 No. 33-1 at 13–14. Plaintiff provides the following definition of "complained":

17 "complained" . . . means for an employee to communicate to you or to
18 a third party a concern about Battelle, which may include actions or
19 inactions by Battelle which imply unfair, discriminatory, retaliatory, or
harassing treatment by you against an employee. This includes both oral
and written communications received by you, directly or indirectly (i.e.,
a communication from a government agency notifying you of a
complaint).

20 *Id.* at 3.

1 For each employee who made such a complaint, Plaintiff asks Defendant to
2 “[s]tate the nature of the alleged mistreatment;” “[s]tate the date(s) of the alleged
3 mistreatment;” “[i]dentify all documents related to the alleged mistreatment;”
4 “[i]dentify all documents that relate to [Defendant’s] response to the alleged
5 mistreatment;” “[s]tate whether any adverse action occurred after the person
6 asserted mistreatment, and the date and nature of the adverse action.” *Id.*
7 Additionally, Plaintiff asks Defendant to “produce any and all documents related to
8 [its] answer to the previous interrogatory.” *Id.* at 13–15.

9 Defendant argues that Plaintiff’s definition of “complained” is overbroad and
10 unworkable. ECF No. 35-1 at 10–11. The Court agrees. This definition could
11 capture even trivial concerns that employees expressed orally to remote third
12 parties—information disproportionate to Plaintiff’s needs and likely beyond
13 Defendant’s access in most instances. To the extent Defendant could compile this
14 information, the burden and expense of doing so outweighs its likely benefit to
15 Plaintiff. Therefore, the Court finds good cause to protect Defendant from undue
16 burden and expense by limiting Plaintiff’s definition of “complained.”

17 But the Court also agrees with Plaintiff that Defendant’s proposed limitation
18 is underinclusive, failing to account for any oral complaints management knew
19 about but did not document. *See* ECF No. 43-1 at 12. To strike a proper balance, the
20 Court narrows the definition as follows:

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1 An employee has “complained” if, in the past ten years,

2 (a) the employee disclosed actions or inactions by John LaFemina,
3 Cindy Doyle, or Marty Conger that imply unfair, discriminatory,
retaliatory, or harassing treatment against any employee; and

4 (b) the employee communicated the disclosure in any manner to
either

5 (1) a government agency, or

6 (2) a department of Battelle Memorial Institute or the Pacific
7 Northwest National Laboratory responsible for receiving and
8 responding to employee complaints or concerns (e.g., Human
Resources, Labor Relations, Employee Concerns, Diversity and
Inclusion, or Equal Employment Opportunity).

9 (c) This definition is subject to the following limitations:

10 (1) if the communication was written or memorialized in
11 writing, this definition excludes any writing outside Defendant’s
possession, custody, or control; and

12 (2) if the communication was oral and not memorialized in
13 writing, this definition excludes any statement outside the
14 knowledge of the people listed in Defendant’s response to
Plaintiff’s interrogatory 1.

15 Accordingly, the Court grants Defendant’s motion for a protective order
16 regarding Plaintiff’s interrogatories 7, 8, and 9, and requests for production 22 and
23.

18 **E. Defendant demonstrates good cause to limit Plaintiff’s request for
19 production 20**

20 Plaintiff asks Defendant to produce all documents related to the thirty-seven

1 issues management identified that were categorized as medium- or high-level
2 significance from 2014 to 2016. ECF No. 33-1 at 12. Specifically, Plaintiff asks
3 Defendant to “produce the causal report for each issue, the various drafts of each
4 causal report, and correspondence related to the drafting of each causal report.” *Id.*

5 Defendant argues Plaintiff’s discovery request “is overbroad,
6 disproportionate, and unduly burdensome.” ECF No. 35-1 at 12. To comply with it,
7 Defendant “will have to gather, process, review, and produce dozens of voluminous
8 draft reports and, presumably, thousands or tens of thousands of related emails.” *Id.*
9 As a compromise, Defendant proposes limiting Plaintiff’s discovery request to
10 evidence regarding the eighteen issues with which she was substantively involved.
11 *Id.* Plaintiff rejects this limitation, arguing evidence regarding the remaining
12 nineteen issues “may show management interference or the absence of interference,
13 which is evidence critical to Plaintiff’s retaliation claim.” ECF No. 43-1 at 13.

14 The Court agrees with Defendant that the burden and expense of producing
15 evidence regarding all thirty-seven issues outweighs its likely benefit to Plaintiff.
16 Therefore, the Court finds good cause to protect Defendant from undue burden and
17 expense by limiting Plaintiff’s discovery request to evidence regarding the eighteen
18 issues with which she was substantively involved.

19 Accordingly, the Court grants Defendant’s motion for a protective order
20 regarding Plaintiff’s request for production 20.

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1 **F. Defendant demonstrates good cause to modify the Scheduling Order.**

2 The Court may modify a case schedule for good cause. Fed. R. Civ. P.
3 16(b)(4). This standard primarily considers the diligence of the party seeking to
4 amend a case schedule. *See DRK Photo v. McGraw-Hill Glob. Educ. Holdings,*
5 *LLC*, 870 F.3d 978, 989 (9th Cir. 2017). Thus, the Court may modify a case schedule
6 “if it cannot reasonably be met despite the diligence of the party seeking the
7 extension.” *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002)
8 (quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992)).

9 Defendant asks for a sixty-day extension of all remaining deadlines, arguing
10 “it cannot reasonably be expected to comply with Plaintiff’s expansive discovery
11 requests by April 19, 2019” and also “will not be able to complete its noted
12 depositions before the discovery cutoff because of Plaintiff’s counsel’s scheduling
13 conflict.” ECF No. 44 at 13. Plaintiff argues Defendant should not receive an
14 extension of time because it has failed to act diligently and “instead has employed
15 a strategy of foot-dragging.” ECF No. 43-1 at 6. The Court finds the record does
16 not support this accusation.

17 Thus, based on Defendant’s representations, the Court finds good cause to
18 extend all remaining deadlines by sixty days. And, because this extension of time
19 cannot be accomplished without continuing the pretrial conference and trial, the
20 Court resets them administratively considering its calendar.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Defendant's Motion for a Protective Order and to Modify the
3 Scheduling Order, **ECF No. 32**, as corrected by ECF Nos. 35, 35-1, is
4 **GRANTED IN PART** and **DENIED IN PART**.

5 A. Defendant's motion is **GRANTED** as to Plaintiff's
6 interrogatories 7, 8, and 9, and requests for production 20, 22,
7 and 23. Defendant shall respond to these discovery requests, as
8 limited by this Order, no later than **May 1, 2019**.

9 B. Defendant's motion is **DENIED AS MOOT** as to Plaintiff's
10 interrogatories 3, 5, and 11, and requests for production 2, 5, 17,
11 19, 25, and 30.

12 C. Defendant's motion is **GRANTED** as to the Scheduling Order.
13 An amended scheduling order will follow.

14 2. The motion hearing scheduled for April 11, 2019 is **STRICKEN**.

15 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
16 provide copies to all counsel.

17 **DATED** this 3rd day of April 2019.

18 
19 **SALVADOR MENDEZ JR.**
United States District Judge